No. 85-889

Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

STATE OF COLORADO,

Petitioner,

v.

STEVEN LEE BERTINE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO, AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF THE RESPONDENT

LARRY W. YACKLE
Counsel of Record
Boston University
School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

GEORGE KANNAR
Counsel for Amici Curiae
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800



QUESTION PRESENTED

Whether a line police officer can, consistent with the fourth amendment, conduct a thorough search of a "backpack" found in a vehicle simply because the driver has been arrested for violation of local traffic laws.

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES.....iii

INTEREST OF AMICI CURIAE.....iv

STATEMENT OF THE CASE.....1

INTRODUCTION AND SUMMARY OF ARGUMENT.....5

ARGUMENT

I. The routine search of luggage found in a vehicle on the sole ground that the driver has been arrested is inconsistent with well-settled fourth amendment standards governing searches in general.
   A. The Automobile Cases
   B. The Luggage Cases
   C. The Pretext Problem.....10

II. None of this Court's prior decisions has approved the field inventory procedure followed in this case...18

III. A simple doctrinal formulation is available to strike the balance between genuine state concerns and constitutionally protected privacy interests in cases of this kind...39

CONCLUSION.....45

TABLE OF AUTHORITIES

CASES

Cady v. Dombrowski,
413 U.S. 753 (1973).....39

Chambers v. Maroney,
399 U.S. 42 (1970).....28

Delaware v. Prouse,
440 U.S. 648 (1979).....16

Delaware v. Van Arsdall,
106 S. Ct. 1431, 1441 (1986).....1

Illinois v. Lafayette,
462 U.S. 640 (1983).....passim

Missouri v. Blair,
No. 85-303.....14

New York v. Belton,
453 U.S. 454 (1981).....9, 13

New York v. Class, 106 S.Ct. 960 (1986).....28

South Dakota v. Opperman,
428 U.S. 364 (1976).....passim

State v. Opperman,
247 N.W.2d 673 (S.D. 1976).....2

United States v. Chadwick,
433 U.S. 1 (1977).....12, 13, 22, 38, 39

United States v. Ross,
456 U.S. 798 (1982).....11, 13

Vale v. Louisiana,
399 U.S. 30 (1970).....13

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. IV.....passim
U.S. Const., amend. XIV.....passim

INTEREST OF AMICI

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Colorado is one of its state affiliates. The ACLU has long worked to protect the rights of criminal defendants and has filed many briefs, as counsel for a litigant or as amicus curiae, in cases requiring the interpretation of federal constitutional provisions related to criminal cases.

The National Legal Aid and Defender Association (NLADA) is a private, non-profit, national membership organization, headquartered in Washington, D.C., whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, NLADA represents approximately 1,753 programs engaged in

providing representation to indigents in civil cases and 586 defender offices engaged in providing representation to indigents accused of criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal services agencies around the nation, as well as assigned counsel plans and private practitioners.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amicus curiae in support of the respondent.

STATEMENT OF THE CASE

In this case, state prosecutors have forced a two-year delay in a state criminal defendant's trial in order to press arguments regarding a search of the defendant's belongings through the appellate courts. Those arguments have been rejected at all levels of the state court system. The Supreme Court of Colorado has appraised local law enforcement needs, grappled with applicable precedents, and sustained an individual's assertion of federal right.[1] Now state prosecutors ask this Court to substitute its own judgment regarding law enforcement needs in Colorado for that of that state's highest court and to unleash the Colorado police to do precisely

---

1 Cf. Delaware v. Van Arsdall, 106 S. Ct. 1431, 1441 (1986)(Stevens, J., dissenting) (pointing out the implications of any attempt by this Court to monitor state court judgments in favor of litigants asserting federal claims).

what the Colorado Supreme Court has forbidden them to do.[2]

The historical facts are reported in the opinion written by the Colorado Supreme Court. Officer Toporek of the Boulder Police Department stopped a truck driven by the respondent, Steven Bertine, and arrested Bertine for driving under the influence.[3] A second officer, Reichenback, arrived at the scene as a "backup" and, on Toporek's request, handled the disposition of the truck. Reichenback was another line police officer like Toporek. He was not employed by the city of Boulder to superintend impounded vehicles; nor did he work for the private company that ultimately took temporary custody of Bertine's truck. Nevertheless, without consulting Mr. Bertine, Reichenback

---

2 Any reversal and remand on the federal issue presented here will, of course, be subject to the state supreme court's independent interpretation of state law. Compare South Dakota v. Opperman, 428 U.S. 364 (1976), with State v. Opperman, 247 N.W.2d 673 (S.D. 1976).

conducted an "inventory" of the truck and its contents. His examination of the truck itself was superficial. Reichenback devoted primary attention to a "backpack" tucked behind the seat. He unzipped the main compartment, unzipped a nylon bag he found inside, removed the covers from tins inside the bag, and, finally, discovered the contraband in issue here.

Officer Reichenback testified that he acted pursuant to a local directive authorizing a "detailed inspection and inventory" of vehicles "used in the commission of a crime." The Colorado Supreme Court held, however, that as a matter of local law Reichenback had "a number of alternatives" from which to choose. While he was authorized to behave as he did, he was also free to seal the truck before it was

---

3 We do not treat threshold questions regarding the validity of the stop and arrest.

towed or to drive it to the nearest lot and lock it. 706 P.2d at 413 n.2.

Bertine moved to suppress the contraband, the trial court sustained his motion on state law grounds, and the Colorado Supreme Court affirmed on the ground that the search violated the fourth amendment, applicable through the fourteenth. This Court then granted certiorari to review the state supreme court's judgment in advance of trial.

INTRODUCTION AND SUMMARY OF ARGUMENT

The problem presented in this case is best illuminated by making clear what is not involved. This is not a case about vehicle inventories, but rather a case about searches of luggage. Certainly, this is not a case about the validity of police behavior respecting illegally-parked or abandoned vehicles. See South Dakota v. Opperman, supra. Mr. Bertine did not leave his truck in a no-parking zone, allow his allotted time to expire in a metered space, or abandon his truck as a derelict on the streets of Boulder. To the contrary in this instance, Bertine responded to Officer Toporek's command to pull over and was thereafter denied an opportunity to see to the proper disposition of his own vehicle.

Nor does this case concern the arrest of a suspect whose vehicle was lawfully parked. In cases of that kind, the police may search the suspect's person and the area into which

the suspect can reach to conceal or destroy evidence. There is, however, no constitutional justification for any further intrusion into a lawfully-parked vehicle simply because its driver is to be taken into custody. Finally, this case has nothing to do with administrative searches of items in the possession of suspects about to be placed in a jail cell. In cases of that kind, this Court has permitted inventory inspections--at the stationhouse. Illinois v. Lafayette, 462 U.S. 640 (1983).

This case is here only because it is conceded that Bertine's truck could not lawfully be parked where he was arrested. Furthermore, inasmuch as Bertine was placed under custodial arrest, he could not be asked to move his own vehicle to a place where it could be parked lawfully.

The problem here is further defined by the particular way in which Officer Reichenback responded to the circumstances

presented. He had other options, options that would have contemplated a lesser intrusion upon Mr. Bertine's privacy. He chose, however, to pursue the most intrusive course of action imaginable. Then and there, without asking Bertine's permission, without knowing how long Bertine would be detained, without knowing whether the garageman would ultimately impound the vehicle, Reichenback conducted a thorough search of luggage in the truck--down to the small tins he found inside a zippered bag inside the backpack. This is the behavior that the Colorado Supreme Court condemned and which the prosecution seeks to defend here.

Our argument is in three parts. First, we point out that the approval of Officer Reichenback's search of luggage in this case would undercut this Court's recent decisions regarding the treatment of vehicles and their contents in the field. Fourth amendment limitations fixed for searches incident to

arrest and ordinary searches on probable cause would be superceded, in effect, by a much broader police authority to conduct an inventory. The approval of an inventory of the contents of luggage found within vehicles, moreover, would undermine the Court's many precedents distinguishing automobiles, in which citizens may have a diminished expectation of privacy, and other containers--in which the fourth amendment's protection for privacy is much stronger. In this connection, we discuss the recurring problem of the pretextual use of inventories to circumvent established limits on searches carried out in hopes of finding criminal evidence.

Second, we take up the Court's precedents, particularly Opperman and Lafayette, and demonstrate that this Court has never upheld an inventory search of the kind and scope undertaken here. In this, we recall the Court's familiar practice of

examining particular fourth amendment issues in turn, without attempting to resolve a range of fact-sensitive problems by reference to unitary theories that fail to capture the richness of the circumstances in which the police, and the fourth amendment, must operate.

Third, we offer a doctrinal formulation that strikes a fair balance between legitimate governmental interests in cases of this kind and the individual's constitutional rights under the fourth amendment. The Court should hold that in routine cases the police cannot conduct an inventory without first obtaining permission from the owner and that any such inventories must be conducted by officials with custodial responsibility for impounded vehicles and property rather than by line police officers who may be tempted to use the authority to take an inventory to mask a search for evidence of crime.

I. THE ROUTINE SEARCH OF LUGGAGE FOUND IN A VEHICLE ON THE SOLE GROUND THAT THE DRIVER HAS BEEN ARRESTED IS INCONSISTENT WITH WELL-SETTLED FOURTH AMENDMENT STANDARDS GOVERNING SEARCHES IN GENERAL

If local police were permitted to make thorough searches of luggage found in vehicles under a sweeping authorization to take an "inventory" of their contents, the great body of this Court's recent fourth amendment precedents, painstakingly developed on a case-by-case basis, would be swallowed up by the rising tide of so-called "administrative" process.

A. The Automobile Cases

If Officer Reichenback's conduct were judged against ordinary fourth amendment standards, the judgment below would be affirmed. His meticulous examination of the contents of Bertine's luggage, simply because it was found inside the suspect's truck, far exceeded the bounds of a search incident to arrest. The controlling precedent, New York

v. Belton, 453 U.S. 454 (1981), established that the passenger compartment and containers therein may be searched for weapons and evidence that the suspect might reach and destroy. Belton might, accordingly, allow Reichenback to check the backpack for a gun, but it would hardly validate reaching inside, extricating the zippered bag, opening that smaller container, finding the tins, opening them, and, finally, examining their contents.[4]

Similarly, Reichenback's behavior fell well below standards fixed for ordinary searches for evidence. Bertine was arrested for DWI. If Reichenback had proposed to search for liquor, the scope of the search actually undertaken was, again, far broader than the fourth amendment would allow. United States v. Ross, 456 U.S. 798 (1982). No one could reasonably have believed that liquor would be found in the tins that

---

4 So far as we are aware, the prosecution made no attempt to justify Officer Reichenback's behavior under Belton.

Reichenback opened. And, certainly, no one had probable cause to search for evidence of any other offense.

B. The Luggage Cases

More important still, Reichenback's behavior ignored a fundamental distinction hammered out in other "luggage" cases, particularly United States v. Chadwick, 433 U.S. 1 (1977). Reichenback did not merely search Bertine's vehicle. He also carefully searched his luggage. Searches of vehicles may be subject to special fourth amendment rules because of the mobility of cars and the diminished expectation of privacy that citizens have in them, given the pervasive regulation to which they are subject. South Dakota v. Opperman, supra, at 367-69. But in the case of luggage, typically used to transport private materials, neither mobility (in the sense of portability) nor regulation diminishing the ordinary citizen's legitimate

expectation of privacy obtains. Even when luggage is found, by chance, in an automobile, the police must have probable cause and a warrant to search in other than exigent circumstances. This is th clear meaning of United States v. Chadwick. If the inventory in the case at bar stands, Chadwick must effectively go--along with Belton and Ross.

The reach of the inventory authority contended for in this case is not restricted to cases involving vehicles at all. Indeed, if the inventory in this case wins approval, we can expect prosecutors in the next case to claim that the police can inventory the contents of a house--on the theory that it is in their custody while they await a warrant authorizing an ordinary search for specified evidence. Cf. Vale v. Louisiana, 399 U.S. 30 (1970).

C. The Pretext Problem

The blanket authority to conduct

inventories asserted by the prosecution in this case would, if recognized, invite pretextual use in aid of ordinary criminal investigations. Time and again, this Court has insisted that fourth amendment doctrine must be sensitive to the possibility of abuse, and police authority to invade individual privacy for administrative purposes has often been checked because such authority might be used pretextually. The requirement in Opperman and Lafayette, for example, that inventories must be carried out on the basis of standard operating procedures was established to protect against the selective employment of the authority to make an inventory in order to mask searches for evidence in the absence of probable cause.[5]

---

5 In a related case before the Court this Term, we argue that the first line of defense against the pretext is the establishment of fourth amendment doctrine groomed to minimize the opportunities for its abuse. Brief of Amici Curiae, American Civil Liberties Union and the Civil Liberties Union of Missouri, Missouri v. Blair, No. 85-303. We also argue in Blair that courts should ask

In this instance, it is hardly sufficient that Officer Reichenback was permitted under a local guideline to behave as he did. First, as the Supreme Court of Colorado made clear, he was also authorized to deal with the situation in at least two other ways--both of which would have been more sensitive to the privacy interests at stake. Thus Reichenback did not simply follow orders, doing what he was required to do according to rigid rules designed to limit discretion in the field. He exercised the very kind of discretion that lends itself to the pretext.

Second, and more fundamentally, even a more rigid rule demanding that field inventories be conducted would have neglected the privacy interests of citizens in Mr.

---

not only whether police behavior in a particular case can be justified on some constitutional basis, but whether the police complied with fourth amendment standards governing the purposes for which they actually acted.

Bertine's place. As Justice Rehnquist warned in Delaware v. Prouse, 440 U.S. 648, 664 (1979)(dissenting opinion), the problems associated with administrative inspections are not met by a simplistic, "misery loves company" insistence that everyone's privacy must be sacrificed. Rather, the possibility of pretextual use must be met forthrightly--with doctrine framed to discourage abuse in each kind of case in turn.

The inventory conducted in this case presented special dangers of pretextual use. The ordinance under which Officer Reichenback acted specified a "detailed" inspection and "inventory" if the vehicle in question had been "used in the commission of a criminal offense."[6] That, in turn, is precisely the

---

6 Officer Reichenback conceded on the stand that the ordinance could not be read literally--such that every vehicle used in the commission of a crime must be impounded. That, of course, would mean that every car stopped in traffic would be impounded and its contents inventoried. No one suggests that any such practice prevails in Boulder.

kind of case in which the police may be tempted to use the cover of such an inventory to mask a search for evidence of the offense in which the vehicle was involved. Indeed, the circumstances of this case generate the unmistakeable odor of the classic pretext. Boulder is the home of the University of Colorado, whose grounds were visible from the place where Bertine's vehicle was stopped. J.A., p. 43. Mr. Bertine, wearing "long red hair," a beard, and glasses, was driving during "early morning hours" with only his dog for company. J.A., pp. 4-5, 10. Ample parking space was available, also within sight of the scene, and it would have been simple enough to dispose of the truck pending Bertine's return by parking and locking it nearby. J.A., pp. 43, 50. Nonetheless, Officer Reichenback chose this occasion for a thoroughgoing exploration of both the vehicle and Mr. Bertine's backpack. He conceded, moreover, that he devoted primary attention

to the backpack, digging into the zippered bag he found inside and, of course, into the tins inside the bag. The trial judge described the inventory of the rest of the vehicle as "slip shod." J.A., p. 81.

We are not in a position to accuse the officer in this case of searching the backpack on the hunch that his young suspect might be carrying drugs and then explaining his unconstitutional behavior away as an inventory conducted in the field. Yet the circumstances of this case, and others we all might anticipate, underscore the real threat of pretext with which the Court must contend. The approval of what Officer Reichenback did here would amount, we think, to tempting honest police officers toward duplicity.

II. NONE OF THIS COURT'S PRIOR DECISIONS HAS APPROVED THE FIELD INVENTORY PROCEDURE FOLLOWED IN THIS CASE

The prosecutors in this case, and the

Solicitor General as amicus curiae, suggest that Opperman and Lafayette have already decided the question presented here. They argue, essentially, that by approving the inventories conducted in the quite different circumstances of those cases, the Court has already boxed itself in--and cannot manage in this case to disapprove an inventory without departing from its precedents. This is a mistaken position, ignoring both the Court's consistent recognition that a different factual setting often presents a different mix of factors and considerations that rightly go into a determination of fourth amendment doctrine, as well as the very real bases for distinguishing what was said in prior cases from what should and must be said here.

This Court has long-since abandoned the notion that search and seizure law can be a seamless web. The world the fourth amendment must address is far too complex for that.

There are too many confrontations between police officers and citizens, too many variations in the circumstances attending such confrontations. It is far more profitable to identify themes and values at stake in fourth amendment cases, to arrange cases within rough categories for analysis, and then to balance competing state and individual interests in a doctrinal formulation that promises to work with respect to each category in turn. Even then, it is often necessary to examine the facts of particular cases in order to apply doctrine framed at a higher conceptual level.

Chief Justice Burger was clear in Opperman regarding the scope of the Court's inquiry. The question at bar was whether the police had violated the fourth amendment "when they conducted a routine inventory search of an automobile lawfully impounded by police for violations of municipal parking ordinances." 428 U.S. at 365 (emphasis

supplied). The Court balanced the interests involved and came to a judgment which now constitutes a referent for courts handling cases of that kind. In Lafayette, the Court addressed the different mix of fourth amendment considerations in stationhouse inventories. The Chief Justice was again explicit in his opening statement of the issue: "The question presented is whether, at the time an arrested person arrives at a police station, the police may, without obtaining a warrant, search a shoulder bag carried by that person." 462 U.S. at 641 (emphasis supplied). The Court thus recognized in Opperman and Lafayette that different contexts beget different arguments, analyses, and results.

Conceding that Opperman had only to do with searches of illegally parked or abandoned vehicles and did not so much as address the validity of luggage searches, the United States nonetheless contends that that

case provides implicit support for the police conduct in issue here. The Court, it is said, treated automobiles as merely a species of container; what was said about one container, argues the Solicitor General, was said about all. This simply is not so. The Court in Opperman was at pains to explain that automobiles are not ordinary containers. They are affected with a diminished expectation of privacy, flowing from their very nature, the manner in which they are used, and the regulatory regimes to which they are subject. Luggage, of course, is quite different--as the Court explained in Chadwick.[7]

---

7 We recognize the Court's concern lest police officers be required to make fine distinctions between and among types of containers in order to comply with the fourth amendment. We think, however, that the Boulder police should have little difficulty telling a backpack from a truck. For all that, houses, too, may formalistically be considered only large containers. But we assume the police also can distinguish a split-level from a convertible.

The inventory approved in Opperman was tied tightly to the recognized need to deal with illegally parked or abandoned vehicles, which present a range of health and safety hazards and must occasionally be towed to impoundment lots. In circumstances of that kind, the Court approved routine inventories in service of the interests stated--as part of the caretaking function being performed. The search conducted here, by contrast, reached directly into luggage in which Mr. Bertine retained a full measure of privacy.

It is true that Opperman allowed the police to open a glove compartment, and we acknowledge that citizens may use cavities attached to a vehicle in much the way they routinely use luggage to store valuables. Yet as Justice Powell made clear in Opperman, that case granted the police "no license...to examine all the contents of [impounded] automobiles." Compartments amounting to

parts of a car were subject to search--not luggage that happened to be inside.[8]

Having derived no support from Opperman, the United States shifts to Lafayette and attempts to analogize the search of Mr. Bertine's luggage on the street to the inventory of an arrestee's possessions immediately prior to the suspect's being placed in a jail cell. Now the individual's "substantial" privacy interest in luggage, as opposed to a vehicle, is conceded. Still, the Solicitor General insists that this search was valid--by analogy to "incidental administrative step[s]" routinely taken at the stationhouse before a suspect is

---

8 The precise question pretermitted in Opperman, whether luggage found in abandoned vehicles may be subject to inventory, is not presented here. Mr. Bertine abandoned neither his car nor his luggage. The police themselves precipitated the circumstances under which the truck was impounded, by causing Bertine to pull over and by making a warrantless arrest. They plainly were not engaged in the routine disposition of derelict vehicles.

incarcerated. This argument is without foundation.

Put simply, the field search conducted in the case at bar formed no part of ordinary procedures for detaining criminal suspects. What the police were justified in doing with respect to Mr. Bertine's belongings carried by him to the station is one thing; what they could do with respect to luggage left elsewhere is quite another.

In a real sense, the inventory approved in Lafayette resulted in police behavior going only a short distance beyond what was permissible as a search incident to arrest. None of the further doctrines mentioned previously was undercut; nor did the stationhouse inventory in Lafayette present the same opportunity for pretextual use as would be suggested by a rule permitting field searches like the one conducted here. The working assumption in Lafayette was that when the police make a valid warrantless arrest,

the suspect necessarily suffers an enormous intrusion upon personal privacy and that the further imposition contemplated by an inventory of things in his or her possession is minor by comparison. Then, too, the extraordinary interests protected by an inventory at the station auger for approval of such an intrusion in those peculiar circumstances. Those interests are by no means so significant in the case at bar--in which the arresting officers could anticipate that Bertine would be detained only a short while.

First, the Court recognized in Lafayette that suspects admitted to jail may injure themselves with personal items (belts, drugs, knives) if those items are not taken from them before they are placed in a cell. We agree, of course, but the argument carries only the point that the police should be permitted to search the person of arrested persons bound for a cell and to separate them

from ordinary belongings.[9] It says nothing regarding the search of luggage, even at the stationhouse; certainly, this argument has nothing to do with searching luggage in the field.

Second, the Court said in Lafayette that the police may be held responsible for items taken from suspects admitted to jail and thus should be allowed to inventory belongings held for safekeeping while the owner is detained. This consideration has two spurs. It is argued initially that the police may act paternalistically to protect a suspect's belongings from third parties--when the suspect is unable personally to do so. The idea that the police should protect a citizen's goods from thieves and vandals is

---

9 The Court in Lafayette carefully avoided the question of "strip" searches. 462 U.S. at 646 n.2. Nor did the Court treat the special problems raised when jailed suspects require access to materials or documents essential to the exercise of rights retained in confinement or to the preparation of a defense.

appealing; we hardly wish to inhibit genuine public service. Yet if the value isolated under this heading is only the individual's interest in his or her possessions, then it seems only reasonable that the police ask the owner whether their assistance (contemplating a search of luggage) is wanted. Said another way, the police should not act on the basis of assumed consent on the part of the individual when the person concerned is available to be asked for explicit consent. Opperman, at 392-93 (Marshall, J., dissenting); cf. New York v. Class, 106 S.Ct. 960, 975 (1986)(White, J., dissenting with Stevens, J.); Chambers v. Maroney, 399 U.S. 42, 64 (1970) (Harlan, J., dissenting).

In the stationhouse situation in Lafayette, it was difficult, perhaps, for the police to ask for instructions from a jail-bound suspect regarding a shoulderbag on his person. In Opperman, moreover, the Court worried that the owner of an abandoned car might not be close at hand to give explicit

consent. In this case, however, and in all routine traffic arrest cases like it, the driver is by hypothesis on the scene and available for consultation regarding the disposition of luggage.

The other spur of the "property interest" consideration has it that an inventory may be needed to encourage the police themselves to deal carefully and honestly with a suspect's possessions and to deter false claims of theft or carelessness made by suspects later. Evidently, the idea is that an item-by-item accounting made at the outset of a detention can at least narrow down the list of suspects within the police department if something turns up missing. Realistically, an inventory is a very rough tool in this context. It neither prevents the first officer from omitting some items from the inventory, nor prevents suspects from claiming later that that is what happened.

Once again, in the stationhouse situation in Lafayette, the suggestion of an inventory to protect against police misconduct or false claims may have made some sense. The suspect is typically present to watch officers go through his or her things and thus can monitor the procedure being followed. Mr. Bertine was not so fortunate. He was in Officer Toporek's squad car headed for the station when Officer Reichenback searched the belongings Bertine was forced to leave behind. The inventory Reichenback prepared bore only the most remote relationship to discouraging either police thefts or false charges of theft.

Third, the Court recognized in Lafayette that an inventory at the stationhouse may be needed to identify a suspect about to be incarcerated. There will be cases, of course, when recalcitrant criminal suspects refuse to cooperate by giving their names, or when suspects are unable to speak for themselves and their identity can be

determined only by looking at operators' permits and the like. It is, of course, extraordinarily important tnat the police know who it is they are about to put in a jail cell--to take account of physical or mental disabilities that may present special risks, to facilitate the notification of relatives or friends, and simply to develop accurate records of this most dramatic deprivation of liberty.

In Lafayette, the Court raised this "identification" point in passing--to support the general rule that inventories just prior to incarceration are permissible. Yet the Court hardly held tnat a thorough inventory is justified if the only purpose is to identify a suspect. Certainly in cases like this one, when a vehicle is pulled over by the police, the identification of the driver is the first matter to be resolved. Officer Toporek asked Mr. Bertine for his license and registration immediately upon approaching the

truck. It would be ludicrous to contend that the inventory conducted later by Reichenback was in any way justified to ascertain Bertine's name and address. The United States, to its credit, attempts no such argument.

Finally, the Court said in Lafayette that "dangerous instrumentalities" such as "razor blades, bombs, or weapons" can be concealed in "innocent-looking articles taken from the arrestee's possession." This is where the United States invests its real hopes. If the Court can be persuaded to announce fourth amendment doctrine for cases of this kind that will permit the police to search whenever a bomb "might" be inside luggage with which they come into contact, then this case, and by extension most search and seizure cases, will be resolved in favor of governmental power.

To be effective against bombs, the police would have to search the most "innocent-

looking" luggage--which, of course, would be the most likely receptacles to be chosen by terrorists. Not only shoulderbags in the possession of suspects headed for jail or backpacks found in trucks driven by citizens arrested for DWI, but containers of all kinds, shapes, and sizes would have to be investigated. Cars parked near governmental buildings or, indeed, shopping centers; houses located near defense installations. There is very simply no logical stopping place if it is once posited that the police can search to detect bombs they have no reason to think will actually be found. In any event, DWI arrest cases hardly mark a sensible starting place. We hope the country has not yet come to such a pass.

Vehicle and luggage bombs are rare in this country, thank goodness; certainly there is no rash of them in Boulder, Colorado. Reasonable fourth amendment doctrine must, accordingly, reject the open-ended hyperbole which has it that the police, in Boulder or

anywhere else, must have the authority to conduct routine searches of automobiles and luggage to check for evidence of terrorist attacks. Any such authority would sweep away well-settled principles of constitutional law limiting police intrusions upon privacy and, of course, pave the way for pretext searches in a range of instances.[10] In this connection, we note that the model rules adopted by the Police Foundation's Project on Law Enforcement Policy suggest no realistic need for any such blanket authority to search. The relevant rule, reproduced in Appendix A, explicitly instructs officers not to open containers found in cars in cases such as this one. In Appendix B, we reproduce the rule guiding police officers in Boston. That rule directs the police to do precisely what we suggest is constitutionally required--simply to ask the person arrested

---

10 Cases in which the police have evidence that a bomb is hidden in luggage present a quite different question.

what he or she would like done with personal property.

This Court had no part of any such argument in Lafayette, where bombs were mentioned only in the context of stationhouse bailments during which a jailed suspect's belongings would be kept inside a public building, near officers and private citizens who frequent such buildings. Even at that, the more serious concern lay with "weapons" that might endanger anyone handling luggage without knowledge of its contents. When a decision has been made to incarcerate a suspect for some period of time, and it is known, accordingly, that the suspect's belongings will be in police custody in the interim, it may be reasonable to hold that an inventory check for weapons is permissible. That is all that was held in Lafayette.

In this case, and in cases like it, however, no special concerns regarding weapons arise. To be sure, the officers here

were briefly in the vicinity of Mr. Bertine's backpack, but it is disingenuous to suggest that they needed to search it to protect themselves from weapons. They were entitled to conduct a search incident to arrest primarily for their own protection; once they exhausted the scope of that search, their authority to make an on-the-scene search for self-protection was spent.[11]

It is also true that Bertine's truck was towed away and was briefly detained in a private impoundment yard, where it is conceivable (though most unlikely)[12] that

---

11 Officer Reichenback himself provided evidence that in the routine case the threat of danger is minimal. He conceded on the stand that he would not have opened the trunk of an ordinary automobile--because the driver could not have reached there to retrieve a weapon. Asked whether an inventory might be conducted for some other purpose, he responded that he simply never searched trunks without a warrant. J.A., p. 45.

12 As opposed to the primitive conditions that obtained at the impoundment lot in Opperman, the lot in this case was secured by a six-foot fence. The gate was locked. In addition, the lot was frequently patrolled. J.A., p. 70.

it was accessible to towing service employees, other officers, or others. Indeed, one can speculate that the truck would have been near and accessible to persons who might be harmed by a weapon even if Officer Reichenback had exercised his authority to have it towed to the public parking lot just up the street. Yet to point out these possibilities is to underscore the scope of the authority to search contended for in this case. If luggage in this truck could be searched before the truck was parked in a local lot, why not luggage in all the vehicles parked there by their owners? Why not luggage in any vehicle parked in any public place? There is nothing to choose between such vehicles and Mr. Bertine's truck; the only argument for a search of the backpack (under this heading) is the mere possibility that it might contain a weapon--a possibility that obtains with respect to any

luggage in any vehicle.[13]

There is only one realistic way out of this dilemma. It is the route the Court has taken many times in the past. The mere possibility that a weapon may be hidden in a place regarding which a citizen enjoys a legitimate expectation of privacy is insufficient in itself to justify a search. When, however, there is evidence that a weapon is there and poses a danger to the police or the public, a different rule may be

---

13 The Solicitor General attempts to bootstrap the search in this case by pointing out that the "containers" taken from Mr. Bertine's vehicle were to be "placed into Property for safe-keeping."

So, of course, was the footlocker in Chadwick. In this case, moreover, Bertine was released on bond within hours after his arrest--making the duration of any such "safekeeping" minimal at best. The typical arrest for a traffic offense would, of course, contemplate no more lengthy detention than occurred here--in a case in which evidence of other crimes was found before the suspect posted bond and was released. In the routine case, officers at the scene know full well that any impoundment will last a very short time.

appropriate. Chadwick, 433 U.S. at 15 n. 9; Cady v. Dombrowski, 413 U.S. 753 (1973).

III. A SIMPLE DOCTRINAL FORMULATION IS AVAILABLE TO STRIKE THE BALANCE BETWEEN GENUINE STATE INTERESTS AND CONSTITUTIONALLY PROTECTED PRIVACY INTERESTS IN CASES OF THIS KIND

This case calls for hard-minded decision-making about real situations that repeat themselves routinely in daily life. The Court cannot blind itself to the implications of the inventory conducted here--to tne signal that a reversal of the Colorado Supreme Court's decision would send to police departments across the country. If settled doctrine regarding the limits of police authority under the fourth amendment is not to be jettisoned sub silentio, and if the police are not to be tempted into the pretextual use of an authority to conduct inventories, the Court must write an opinion that pays more than lip service to the

genuine privacy interests at stake. Definite lines can and must be drawn for cases of this kind--lines that hold the police to standards that do not, on the precedents, control in other situations. An opinion drawing such lines is plainly feasible; we have offered bases on which both Opperman and Lafayette can be distinguished.

Once again, it is well to be clear on the kind of case that is presented here. The luggage in this case was searched, by hypothesis, only because it was in a vehicle the police had stopped and because the driver was unable, because of his arrest, to see to its disposition personally. The Court need say nothing here about separating a criminal suspect from his or her possessions before incarceration or what the police might do in cases in which the identity of an individual is not readily determined in the routine fashion.

The only question is the disposition of luggage at the scene. The simplest answer is that the police should do what the driver would do if he or she were able to make arrangements personally. In the routine case, that would be to move the vehicle to the nearest lawful parking place and there to park and lock it. The fourth amendment does not insist that police officers drive private vehicles themselves. Officers might reasonably hesitate to risk mechanical failure or accident along the way, and, in any event, the operation of a vehicle might contemplate yet another intrusion upon the owner's privacy. If, however, a vehicle can be routinely towed to a police impoundment yard (or to a private yard designated to receive vehicles impounded by the police), it can just as easily be towed to an ordinary parking lot. Then, the owner can either retrieve the vehicle and the luggage upon his or her release, or arrange for family or

friends to do so. There is nothing elaborate in this. This is the way that countless cases are handled every day--without engaging all the time, expense, and constitutional difficulties associated with impoundment.

There may be instances in which the owner would prefer the added protection for luggage attending impoundment by the police. When, for example, the contents are particularly valuable, the owner may be prepared to accept the intrusion upon privacy associated with an inventory in order to ensure that luggage is not exposed to ordinary theft in a parking lot. The critical fact, in cases of the kind considered here, is that the owner of such luggage is necessarily available to be consulted.[14] The Court should insist that officers simply ask suspects to be taken into custody in these circumstances what they

---

14 We do not speak to the "standing" difficulties that might be presented in cases in which someone other than the driver has a privacy interest in luggage.

want done with their luggage. Such a rule protects the suspect's property, and addresses the various related interests discussed above, far better than the approval of a blanket authority to conduct a thorough search without regard for the individual's wishes. If the individual declines to authorize the impoundment of luggage and, instead, asks the police to have the vehicle containing it towed to a parking lot, such a request should be respected.

Special circumstances will arise occasionally, and in some narrowly-defined cases we anticipate that the Court may reasonably establish exceptions to the general rule we advance. In the extremely rare instance, for example, in which there is reason to believe that luggage contains a bomb or weapon, an emergency authority to conduct a reasonably-defined search may be recognized.

Even in exceptional cases, however, line officers in the field should not be authorized to conduct inventories themselves. Any such authority would resurrect the temptation to use the inventory as a pretext. Instead, other public employees, charged not with the investigation of crime but only with the administrative disposition of vehicles, luggage, and the like, should be assigned the exclusive task of making inventories for their independent purposes. Such a separation of functions will not guarantee the elimination of pretext searches, but it promises to reduce their incidence in a relatively painless manner.

In the run of cases, the police will be able to follow the rule we suggest without difficulty. Refinements, of course, should await concrete cases in which competing interests can be identified and resolved against a definite factual backdrop. In the end, routine cases of this kind call only for

common sense--not the bad law that harder cases promise to make.

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the Colorado Supreme Court. The opinion should explain that the inventory search conducted by Officer Reichenback violated the fourth amendment inasmuch as it was undertaken without consultation with and approval by Mr. Bertine.

Respectfully submitted,

LARRY W. YACKLE
Counsel of Record
Boston University
School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

GEORGE KANNAR
Counsel for Amici Curiae
American Civil Liberties
Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

APPENDIX A*

Rule 603. Prisoner's Property.

A. Definition. When a person is arrested in or around a vehicle which he owns or has been authorized to use, and the vehicle is not otherwise subject to seizure, it shall be classified as prisoner's property.

B. Disposition of Prisoner's Property. A prisoner shall be advised that his vehicle will be taken to a police facility or private storage facility for safekeeping unless he directs the officer to dispose of it in some other lawful manner. In any case

---

* Model Rules for Law Enforcement: Searches, Seizures and Inventories of Motor Vehicles, Approved Draft, April, 1974, p. 63 (emphasis supplied).

where a prisoner requests that his vehicle be lawfully parked on a public street, he shall be required to make his request in writing.

If the vehicle is found to be the property of a person having no criminal involvement in the offense, such person shall be notified of the location of the vehicle as soon as practicable.

C. Initial Procedure with Respect to Prisoner's Property. If a vehicle classified as prisoner's property is not taken into police custody, it shall not be inventoried. If it is necessary to take a prisoner's property vehicle into police custody, the vehicle should be taken to a police facility or a location in front of or near a police facility. Immediately upon arrival at a police facility, if the vehicle is not locked, the arresting officer shall remove from

the passsenger compartment all containers--such as boxes or suitcases--and any other personal property which can readily be seen from outside the vehicle and which reasonably has a value in excess of $25. After removing any such property, the officer shall, if possible, roll up the windows and lock the doors and trunk. Any property so removed shall be brought into the police facility and appropriate entries and returns made. Containers shall not be opened [at this time]; however, they may be sealed to insure the security of their contents. No other inventory or search of the vehicle shall be made at this time.

[D. Procedure After 24 Hours. If, within 24 hours of the time that the prisoner was arrested, a person authorized by the prisoner (or the

prisoner himself, if released) does not claim a vehicle which was classified as prisoner's property and taken to a police facility, a complete inventory of its contents shall be made under Rule 607.]

APPENDIX B**

407. Vehicle Inventories

Whenever you are securing a vehicle on the street (for example a vehicle involved in an accident or one which a person you arrested was driving) and you discover valuable personal property in it, you should ask the person who owns the property what he wants done with it. If the person who owns the property is not available, you should remove it from the vehicle and turn it over to the duty supervisor when filling out your report on the incident. In this case, you should leave written notification in

---

** Boston Police Criminal Investigative Procedures: Search Warrants, Motor Vehicle Searches and Searches Incident to Arrest, February, 1978, p. 110 (emphasis supplied).

the vehicle describing what property was removed and where and when it may be claimed.